Supreme Court, U.S.
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No. 92-1209

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

LAWRENCE M. BAREFORD, *et al.*,
Petitioners,

v.

GENERAL DYNAMICS CORPORATION, *et al.*,
Respondents.

PETITIONERS' REPLY MEMORANDUM

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QUESTION PRESENTED

Whether the dismissal of a civil action on the pleadings, based on nothing more than the intervenor Government's bare assertion of the state secrets privilege, violated the petitioners' constitutional rights of access to the courts.

PARTIES TO THE PROCEEDINGS

The petitioners' are the legal representatives of sailors killed and injured on board the U.S.S. STARK on May 17, 1987. Their names are as follows:

Lawrence M. Bareford (injured)
Mr. and Mrs. Roland Bolduc (Doran H. Bolduc, deceased)
Mr. and Mrs. Leonard Calkins (Jeffrey L. Calkins, deceased)
Mr. and Mrs. Robert A. Caouette (Mark Robert Caouette, deceased)
Mrs. Kathleen Ciletta (John A. Ciletta, Jr., deceased)
Mr. and Mrs. Robert DeAngelis (Christopher DeAngelis, deceased)
Mr. and Mrs. Rodney Erwin (Steven Thomas Erwin, deceased)
Mrs. Shirley Jean Farr
Kasandra Ann Farr, a minor
Mr. and Mrs. Wilson P. Farr (Jerry Boyd Farr, deceased)
Mrs. Ernestine Foster
Tyrone Foster, a minor
Vernon Foster, a minor
Leo Foster, Sr.
Mim Foster Gaines (Vernon Foster, deceased)
Karen Gangidine (Martin Supple, deceased)
Mr. and Mrs. Nathan Grissette, Jr. (Dexter D. Grissette, deceased)
Mrs. Frances Homicki
Laura T. Homicki (Daniel Homicki, deceased)
Mr. and Mrs. Kenneth D. Janusik (Kenneth D. Janusik, deceased)
Mrs. Diane P. MacMullen

Deborah A. MacMullen, a minor
Lauren E. MacMullen, a minor (Thomas J. MacMullen, deceased)
Mr. and Mrs. Walter S. Phelps, III (Jeffrey Lee Phelps, deceased)
Mrs. Diana Lynn Pierce
Randi Lynn Pierce, a minor
Logan Mitchell Pierce, a minor
Mr. Donald W. Pierce (Randy E. Pierce, deceased)
Robert Quick
Karen Jean Welch (Kelly R. Quick, deceased)
Mrs. Carol A. Shippee
Patricia C. Shippee, a minor
Timothy M. Shippee, a minor
Brian R. Shippee, a minor (Robert L. Shippee, deceased)
Mr. and Mrs. Roger Stephens (Lee Stephens, deceased)
Mr. and Mrs. Bobby G. Stevens (James R. Stevens, deceased)
Mr. and Mrs. Alfred Ulmer (Vincent L. Ulmer, deceased)
Mrs. Lori E. Weaver
Patty J. Strong (Wayne R. Weaver, II, deceased)
James R. Wheeler (injured)
Mr. Joseph E. Wilson
Mrs. Mamie E. Wilson (Lloyd A. Wilson, deceased)

The respondents are private corporations:

General Dynamics Corporation
Hughes Aircraft Company
Unisys Corporation
General Electric Co. d/b/a RCA Corporation

RCA Government Systems Division
General Electric Aerospace
Advanced Technologies, Inc.
Rockwell International Corporation
FMC Corporation
Cardion Electronics, Inc.
Raytheon Company

At trial, the United States Government, through the Department of Justice, intervened in this case and is also a respondent in this proceeding.

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PETITIONERS' REPLY MEMORANDUM

This memorandum is filed in reply to the opposition brief filed by the contractor respondents.

1. This Court Should Resolve the Real and Intolerable Conflict Among Circuit Courts in the Substantive Treatment of State Secrets Assertions by the Executive.

The defense contractors, in their opposition brief, have suggested that there is no real conflict at all among

circuit courts on the substantive treatment of the state secrets privilege. Indeed, they find "remarkable consistency" -- almost as if there *were* standards to guide district courts in the application of the privilege. The contractors shrug off the circuits' inconsistent treatments of the privilege as an "illusion" created by "widely different factual and procedural circumstances." *See* Brief in Opposition at 2. Like some Orwellian credo, they seem to say that lack of uniformity *is* uniformity.

The conflict presented here is real. There are no standards to guide the lower courts in their treatment of this privilege. The conflict can perhaps best be observed by an example.

Consider that one is a district judge. A product liability suit is filed against private manufacturers. Before anything other than the pleadings has been filed, the United States Government intervenes. The Government moves to dismiss the suit in its entirety based on nothing more than generalized assertions, by a department head, that the case threatens national security.

Confronted with this typical scenario, what then are the substantive precedents that guide the district judge in his or her treatment of the state secrets privilege? Well, the district judge could stay the proceedings until the national security threat no longer exists. *Clift v. United States*, 597 F.2d 826, 830 (2d Cir. 1979). The district judge could order an *in camera* trial. *Halpern v. United States*, 258 F.2d 36, 44 (2d Cir. 1958). The district judge could deny a jury trial and appoint a special master to establish safeguards. *Loral Corp. v. McDonnell Douglas Corp.*, 558 F.2d 1130, 1132-33

(2d Cir. 1977). The district judge could deny the motion to dismiss and order the Government to make item-by-item objections to discovery. *In re United States*, 872 F.2d 472, 478 (D.C. Cir. 1989), *cert. dism'd sub nom. United States v. Albertson*, 493 U.S. 960 (1989); *National Lawyers Guild v. Attorney General*, 96 F.R.D. 390, 394 (S.D.N.Y. 1982); *United States v. Felt*, 502 F. Supp. 74, 76 (D.D.C. 1980). The district judge could order the Government to submit to depositions in a secure facility or to answer limited interrogatories. *In re Under Seal*, 945 F.2d 1285, 1287 (4th Cir. 1991); *Jabara v. Kelley*, 75 F.R.D. 475, 489 (E.D. Mich. 1977). The district judge could consider the privileged information removed from the case and allow the plaintiffs to proceed without the information. *United States v. Reynolds*, 345 U.S. 1, 11-12 (1953); *Northrop Corp. v. McDonnell Douglas Corp.*, 751 F.2d 395, 401 (D.C. Cir. 1984); *N.S.N. Int'l Industry v. E.I. DuPont de Nemours & Co.*, 140 F.R.D. 275, 281 (S.D.N.Y. 1991). The district judge could require the plaintiffs to present a *prima facie* case on nonprivileged information against the manufacturers. *Ellsberg v. Mitchell*, 709 F.2d 51, 65 (D.C. Cir. 1983), *cert. denied sub nom. Russo v. Mitchell*, 465 U.S. 1038 (1984). Or, as here, even if the plaintiffs had presented a *prima facie* case, the district judge could dismiss the suit without further scrutiny.

In short, there are *no standards* which guide the lower courts and litigants in the proper substantive treatment of the executive's assertion of the state secrets privilege. The lower courts' treatment of the privilege has become a free-for-all, in which any option is available on any set of facts in any circumstance.

In an effort to manufacture some uniformity among these contrary holdings, the contractors first urge that the

courts agree on the manner in which the state secrets privilege should be invoked by the executive. *See* Brief in Opposition at 3-5. The petitioners have never raised that issue. Rather, the issue presented here is how the courts are to treat the privilege, consistent with constitutional rights, once the privilege has been invoked.

The contractors next urge that there is no conflict among circuits that dismissal is "necessary" where a plaintiff cannot make out a *prima facie* case without privileged evidence. *See* Brief in Opposition at 7-9. Such a proposition ignores those cases (including *Reynolds*) which do not require a *prima facie* threshold. *See, e.g.*, *Clift*, 597 F.2d at 830; *Loral Corp.*, 558 F.2d at 1132-33; *Halpern*, 258 F.2d at 43-44; *Spock v. United States*, 464 F. Supp. 510, 519-20 (S.D.N.Y. 1978).

Such a proposition also ignores the fact that "*prima facie* evidence" itself is an amorphous standard. "*Prima facie* evidence" can mean whatever the lower courts choose for it to mean.

For example, in the present case, the Fifth Circuit adopted a summary judgment standard of review. *See* Pet. App. 7a. However, in contrast to this Court's teachings, summary judgment was granted before *any* discovery was conducted. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 318 (1986) (Rehnquist, J.) (plaintiff is not to be "railroaded" by premature summary judgment before discovery is complete). And, the defendants were not required to present any evidence (other than the conclusory affidavit) in support of summary judgment. *Id.* at 328 (White, J., concurring) (conclusory assertions are insufficient, regardless of how the movant responded).

Nonetheless, the petitioners produced below an enormous body of evidence, all of which was unrefuted by the respondents and all of which was in the public domain.

Appended to this reply brief are just two of the affidavits presented below. In a remarkable contradiction (and in an effort to assist General Dynamics in a separate *qui tam* suit in California in which the Government did not intervene), the Government judicially admitted that these affidavits "do not contain classified information." (R.E. 43).

These affidavits, by former General Dynamics' employees, provide sworn evidence of every element of the petitioners' causes of action for fraud, products defects, negligence, and deceptive trade practices. *See* Reply App. 1a-25a.[1] In addition, the petitioners provided affidavits from the commander of the STARK at the time of the attack, the Secretary of the Navy at the time of the attack, the lengthy and unclassified reports by Congress on the incident, and a host of other evidence -- all uncontroverted.

There is perhaps no better way for this Court to determine how chaotic the case law in this area has become than to read these nonclassified affidavits. It is submitted that if these uncontroverted affidavits alone do not present fact issues which preclude summary judgment, or do not present a *prima facie* case, then no proof could ever survive dismissal in a state secrets case. *Compare Ellsberg v. Mitchell*, 709 F.2d at 65-66 (*prima facie* evidence met by defendant's admission that wiretaps were pursued without a

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[1] For economy of presentation, the exhibits attached to the affidavits have not been reproduced here, although they are referenced in the affidavits and are part of the record below.

warrant even though factual record not developed by discovery); *In re United States*, 872 F.2d at 478 (*prima facie* evidence met by substantial information obtained under the Freedom of Information Act). Since there are no substantive standards to guide the district courts, the quantum of proof necessary to survive dismissal is unknown.[2]

Not only is the conflict presented here real and substantive, but it is also intolerable. The longer this Court waits to resolve these substantive conflicts, the greater the potential for abuses done in the name of national security. If this precedent is allowed to stand unchecked, the Government need merely assert a "threat" to national security to procure dismissal of any civil case. Such an invasion of the judicial prerogative should no longer be permitted.

2. This Court Should Restore a Constitutional Balance.

Finally, and perhaps most importantly, the contractors have chosen not to address the central issue raised by this petition -- that is, the proper compromise that should be struck between the constitutional right to protect state secrets and the constitutional right of access to the courts. *See United States v. Reynolds*, 345 U.S. at 9 (courts should apply a "formula of compromise" with the state secrets privilege).

The contractors refer to the constitutional concerns identified in *Reynolds*, and properly raised here, as a "red

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[2] The respondents refer to *Zuckerbraun* as being "on all fours" with this case. *See Zuckerbraun v. General Dynamics Corp.*, 935 F.2d 544 (2d Cir. 1991). However, in *Zuckerbraun*, the plaintiff presented *no* proof after the state secrets privilege was invoked. *Id.* at 548.

herring." *See* Brief in Opposition at 7. The contractors want this Court to hold that the bare assertion of the state secrets privilege by the executive, without further judicial scrutiny, is sufficient to warrant dismissal of a litigant's case. However, such a result was specifically rejected with the privilege against self-incrimination, and should be rejected here. *Reynolds*, 345 U.S. at 8. Instead, this Court should establish standards which ensure a compromise between the competing constitutional concerns. *Id.* at 8-9.

As the experience of the lower courts demonstrates, this Court's resolution of these issues is long overdue. This petition presents this Court with the unique opportunity to reconcile the conflicts below and to establish specific standards for the treatment of the common law state secrets privilege, consistent with the rights guaranteed under the Constitution.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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DECLARATION OF DAVID VILLANUEVA

I, DAVID VILLANUEVA, declare and state as follows:

1. That I am over 18 years of age, and reside in Riverside, California. I currently own and operate my own business, located at 11130 Magnolia Avenue, Suite A, Riverside, California 92505.

2. I am a former employee of General Dynamics Corporation, Pomona Division, where I worked from January 1, 1980 until approximately September 11, 1987. The Pomona Division, during that time, was the prime contractor for the Phalanx gun system, under contract with the United States Navy.

3. In August of 1976, I joined the United States Navy and was in active duty, and attended Consolidated Naval Electronic Warfare School in Pensacola, Florida. Subsequently, I went out to Pearl Harbor in March of 1978, as an "Electronic Warfare Specialist". During my career with the Navy, I collected intelligence, analyzed subsurface, surface, and airborne activities; recommended tactical response to threat scenarios; maintained, calibrated and repaired analogue, digital, RF, microwave, and signal processing equipment; such as receivers, jammers, blankers, antenna systems, control systems, radar systems, and test systems; analyzed soviet and enemy strategies; weapon profiles,; and theater assessments.

4. I was in the Navy until October of 1979, and began working at General Dynamics on January 1, 1980.

5. I first began work on the Phalanx program in August of 1981, where because of my technical background and capability, I was assigned to conduct fault isolation and failure analysis on Phalanx circuit cards, analyzing failures that had occurred both in the forward build production process, as well as in the field. In order to properly diagnose these failures, which General Dynamics did not previously have the capacity to do, I began creating software programs that would exercise the circuitry and correctly reflect functional results. I discovered widespread, consistent failures for virtually all circuit cards and their associated functions within Phalanx systems produced by General Dynamics.

6. The Phalanx Close-In Weapon System (CIWS) was designed to be the United States Navy's last line of defense against airborne threats to the fleet, and in particular, low-flying missiles. The Phalanx functions on a radar subsystem that includes both search and track radar. The radars provide data to a fire control computer, which processes targetting information and directs gunnery. Upon location and identification of a target that matches the Phalanx program criteria of an inbound threat, the search radar "hands over" to track radar. Phalanx is designed for extremely short reaction time for search to track handover, and gun settling, and is also designed to maximize accuracy upon firing by eliminating intra-system alignment errors caused by movement of the ship.

7. The Phalanx acquires its target, and automatically tracks, fires, registers target destruction, assesses new threats and engages them sequentially.

8. The Phalanx fires its M6-1A1 gattling gun, which has six barrels and has electrically driven train and

elevation controls, and uses closed-loop spotting by measuring both its target and bullet location, updating the fire control solution to reduce difference to zero, thereby aligning the bullets with the targets. In this manner, the Phalanx is designed to automatically and continuously direct a stream of bullets onto the target throughout a firing, at 3,000 rounds per minute. This informaiton is documented on a 1987 Phalanx brochure put out by General Dynamics. This brochure is attached to this declaration, and incorporated herein as Exhibit A.

9. The circuit cards that make up the Phalanx are organized in drawers, and particular drawers are associated with particular functions. The broad functions of the different drawers includes search processing, track processing, target detection, self-testing systems, radio frequency (RF) processing, intermediate frequency (IF) processing, and another that deals with power supply functions. The vast majority of my work at General Dynamics related to these "drawers" and the circuit cards within.

10. I was, and continue to be, intimately familiar with the functional design and electronic circuitry incorporated in this system, and the way the phalanx conducts signal processing from radar returns. I am knowledgeable regarding the technical methods, processes and designs associated with how Phalanx checks itself with digital wrap-around tests, checking its capacity to accurately compute elevation, and azimuth. I am familiar with the specific information that was classified as (sic) the time I was with General Dynamics, as I had full clearance and access to this information.

11. In 1982, when we were just beginning to deliver the first completed systems to the United States Navy, I was tasked to conduct fault isolation and analyze failures of Phalanx circuit cards. I immediately became aware the GD test software programs used to test Phalanx circuit cards were defective, and hardware deficiencies remained undetected in production.

12. I further discovered that the software programs were certified by General Dynamics to meet Navy specifications, and that management knew it could not possibly meet specifications. In October of 1985, I became Senior Engineer, which provided me with greater access to all Phalanx software test programs, and authority to investigate deficiencies.

13. One major example of my findings is documented in a briefing that I directed to management in 1985, entitled "Blanket Software Changes." This document is attached and incorporated by reference as Exhibit B. The computerized test equipment designated TE-8009 is one piece of equipment that was used to test 120 out of the approximate 300 circuit cards that make up a completed Phalanx system. As I documented in my report, "The existing tests suffer from what is commonly referred to as 'spaghetti programming'". In this report, I described detailed findings that demonstrated test software used on TE-8009 did not and could not perform tests in a manner which was even remotely accurate. As I warned management in my "Conclusion", "the effects of impetuously constructed software can prove enduring and proliferative."

14. I prepared this report for the following managers: Delano Alli, my Group Engineer; Rick Riley, the Chief of Engineering for Phalanx Production; and Ed

Roebuck, the Manager of Engineering for Phalanx Production. I prepared this report to intentionally begin documenting clear evidence that the test software written and employed by General Dynamics to test circuitry for production Phalanx systems, was defective and could not possibly produce accurate results, and in many cases was unable to produce a result at all. I had verbally reported these facts to Delano Alli and Rick Riley since beginning work on Phalanx test software in 1981. With the exception of allowing me to continue in my efforts, which I pursued upon my own motivation and volition, no corrective action was devised, authorized, or taken by General Dynamics management.

15. To better understand how Certified Test Operators (CTOs) managed to achieve "pass" results in order to move this circuitry forward, and assemble the cards into completed Phalanx systems that were delivered to the Navy, I personally interviewed one hundred per cent (100%) of the test operators working on the program between 1985 and 1986.

16. I learned that on a daily basis, CTOs consistently employed various techniques and methods of "test cheating" in order to obtain "pass" results at "lower level tests" (circuit card testing).

17. I further learned that performance ratings given by management to the CTOs, were based on production yields in order to force these workers to employ illegal methods of test cheating and obtain "pass" results. Because of the condition of both Phalanx hardware, and Phalanx test software, the only way General Dynamics could manufacture and deliver completed Phalanx systems was to falsify the results of circuit card testing.

18. By 1985, the Pomona Division had received large amounts of failed circuit cards from systems deployed upon Navy ships. The falsification of required tests resulted in higher production rates, and General Dynamics was well on its way to satisfying the Navy's requirement for several hundred Phalanx systems. As many systems were not deployed upon Navy ships, the Pomona Division received increasing numbers of reports regarding the system's inability to remain operational once activated. I believe that on an average, Phalanx systems were able to stay "up" (turned on and in an operational mode) for six to twelve hours before breaking down due to circuit card failures. We learned from our own General Dynamics technical representatives, who conducted field trips to evaluate problems with Phalanx systems deployed on Navy ships, that they could not understand how the Phalanx systems could have made it through tests at General Dynamics, based on blatant and even visual defects they found while analyzing field failures on ships.

19. These types of reports became all too frequent, and continued through the entire course of my employment at General Dynamics. An example of one such report is attached to this declaration and incorporated by reference as Exhibit C. This report is a March 27, 1987, memorandum from Gregory Shelton, a GD technical representative who was evaluating problems with the Phalanx system on board the USS Roosevelt. He questioned how "Mount 22 was delivered to the Fleet with six miswires in the LCP front panel." He stated, "The issues here are obvious. The board was mis-wired, mis-inspected, incorrectly tested, and was not diagnosable in the field. I do not understand how this problem was not caught at TE-8000 [Final Acceptance Test] or earlier." This report is directed to the Senior Executive Management of General Dynamics Pomona Division.

20. Also incorporated in Exhibit C is another example of field reports that we regularly received at the Pomona Division was documented by C. J. Delarge regarding his findings when providing special training and technical assistance to resolve problems with the Phalanx System deployed upon the USS Harlan County, dated February 19, 1987. In this report, Delarge describes how seven new replacement circuit cards failed, after replacing cards that initially failed. He describes a typical Phalanx System's inability to remain operational for any amount of time without experiencing critical circuit card failures.

21. General Dynamics, upon delivering completed Phalanx Systems to the Navy, certified that Phalanx had passed the Government required thirty-hour operational "Final Acceptance Test." General Dynamics knowingly concealed that test cheating methods were employed at this system level as well. Not one single Phalanx system produced by General Dynamics in 1981 through at least 1987 could have legitimately passed this test. The United States Navy heavily relied upon this final test, and GD's misrepresentations, because this test would comprehensively demonstrate Phalanx reliability in performing its functions, during 30 hours of failure-free operation.

22. In fact, Phalanx systems consistently broke down when subjected to final acceptance testing, but computer records of these failures were erased through the use of another outlaw software program known as "PUDD", which stood for "Purge Dot D" ["D" is the computer's record of test data]. Further, secret repairs and rework were conducted on Phalanx Systems undergoing Final Acceptance Test, to keep the system operational. Technicians identified circuit cards or portions of circuits that were failing, and employed methods to bypass, massage, and tweak failing

circuitry to whatever degree necessary, while the thirty-hour clock was ticking. As a result, the Navy was delivered (1) Phalanx Systems that were defective, and subject to certain failures after being turned on, and (2) thirty-hour Final Acceptance Test data that was falsified.

23. General Dynamic's certifications that accompanied each and every Phalanx System delivered to the United States Navy, representing that the Phalanx Systems met Navy specifications, were simply and completely false. Final Acceptance Test falsification was well known within the General Dynamics Plant at Pomona. Management sent clear messages often and in many ways, to the work force, that the Navy must never find out about test falsifications and that jobs were at stake. This was the reason that I attempted to resolve the problem internally. It was during this period of time, between approximately 1984 and 1986, that the Phalanx destined for the USS Stark was manufactured. That system was subjected to false testing at both lower level and final acceptance tests.

24. Throughout 1985 and 1986, I directly confronted Phalanx program management, and warned them that an entire, program-wide redevelopment of production test software was needed. I further informed management that we were not testing Phalanx systems to Navy specifications, and that we were incapable of doing so because the test software was completely defective. The managers I confronted, met with, and sent documentation to, included Delano Alli, Group Engineer; Rick Riley, Chief of Engineering; Ed Roebuck, Manager of Engineering; and ultimately Clark Bostick, the Director of Phalanx Production, in approximately the spring of 1986. Mr. Bostick reported to Vice-President of Production for the Plant, Chuck Blood, who reported directly to the General Manager, Sterling Star.

25. At all times, these General Dynamics managers, and General Dynamics management in general at the Pomona plant refused to take the required corrective action. Management defended the Phalanx system by citing circuit card test yields that were absolutely the function of test cheating methods that CTOs were forced to employ.

26. Based on the results of my meeting with Mr. Bostick, and my clear impression that no corrective action would be considered or taken, I decided to continue climbing the ladder to the highest levels of the company. I next attempted to set up a meeting with Chuck Blood, but instead arranged a more convenient meeting with Ron Auletti, a Vice-President. We met in the summer of 1986. He demonstrated that he was amazed at this information, and promised that he would take action to stop the widespread test falsification immediately, and get to the root of the software problems.

27. Along with General Dynamics employee Jason Madden, I presented detailed information to Auletti, thoroughly describing my findings with regard to defective test software, test falsification. I directly informed him that Phalanx Systems we were delivering to the Navy were completely untested, and General Dynamics could not legitimately represent that the systems met specifications. In fact, we also discussed the widespread evidence coming in from the field that the Phalanx Systems were extremely unreliable, and explained that this was directly due to the fact that required testing was simply not performed.

28. Immediately after this meeting, I was removed from my job responsibilities, and completely kept away from Phalanx-related hardware, software, and personnel. I was given such responsibilities as counting components in the

stock room, cleaning off tables and sweeping floors. I continued receiving my salary as a lead engineer.

29. After the Stark incident, and during the same week that General Dynamics delivered the 500 Phalanx Systems to the Navy, in the summer of 1987, I met with Gary Smith of NAVPRO. After describing the defective nature of the software, and associated test falsification that had been occurring for years, he asked if I would meet with Captain Major of the United States Navy, from Phalanx Program Management. Two days later, I met with Captain Major. This meeting was conducted off-site, and I met him at a gas station at approximately 3:30 p.m., during a work day. We met inside his station wagon. After I described the details and facts to Captain Major, he asked me what I thought he could do to stop this problem. I told him that the answer was pure and simple, that the only way was to shut down the plant until a comprehensive redesign and rewrite of Phalanx software, and evaluation of Phalanx hardware, was completed. Production would simply have to stop all together, or the Navy would continue to take delivery of Phalanx Systems with hidden latent defects, with General Dynamics misrepresenting that the Systems had been tested.

30. To further document evidence, I conducted a "veteran CTO survey" in 1987, which is attached to this declaration as Exhibit D, and incorporated by reference herein. Because CTOs were afraid of losing their jobs, I designed this survey to keep the individuals anonymous, while still documenting their admissions that they falsify Phalanx testing as a result of management pressure. I sent copies of this to General Dynamics Phalanx program management. The survey indicates how many CTOs agreed with certain statements and what percentage of all CTOs that number represented. For example, 43% of the CTOs agreed

that "Management pressures me into getting the hardware out any way I can." 52% admitted, "I believe management will retaliate against me if I make waves by refusing to run bad procedures [test programs]".

31. I received a negative response from management, and was basically told to "shut up and do your job". While I was working on software, I was unable to resolve even a fraction of the software discrepancy reports sent to me by test operators because management insisted that no problem existed.

32. In September of 1987, I went to work with Dyncorp, a local company in Southern California that was on contract to the Navy's Fleet Analysis Center (FLTAC) to analyze new Phalanx test software proposed by General Dynamics to the Navy for acceptance and use. Because of my familiarity with the Phalanx program and the Pomona plant, Dyncorp assigned me the task of working on that Naval contract, to analyze Phalanx software. Once again, I found and documented in great detail, that software programs written for Phalanx circuit card testing by the Pomona plant did not perform tests to specifications, and was completely defective. When GD learned that I was working on Phalanx software, Dyncorp was pressured to reassign me to other contracts. However, in July of 1988, I was asked to look at another software program from General Dynamics related to the Phalanx system. I later learned that Jason Madden had turned this program over to the Naval Plant Representative Office (NAVPRO) at the Pomona plant. NAVPRO had consulted with FLTAC, and since Dyncorp had the contract to evaluate GD software, Dyncorp was chosen to analyze this data cartridge software program for the Navy. Dyncorp directed me to conduct this analysis, because of my familiarity with GD's test software system.

33. I conducted my analysis, which was confirmed by engineers at FLTAC, as documented by the Navy. My analysis for Dyncorp, and the Naval confirmation of this analysis and the functions of this outlaw program, are attached to this declaration and incorporated by reference as Exhibit E.

34. This software program clearly had only one purpose: to break the security codes on the Phalanx program test equipment at General Dynamics, and allow operators or engineers to alter required test parameters at will. This allowed GD to generate "pass" results no matter what the condition and capacity of the Phalanx circuit cards. The program left no trace of its use. In fact, in many cases, this program would generate a "pass" result without testing a card at all. General Dynamics did not refute this software analysis.

35. For reasons unknown to me, and beyond my logical comprehension, the Navy allowed General Dynamics to conduct its own investigation and report how this program had been used, to what extent, and for how long. It was no surprise when the company reported back to the Navy that the program had only been found on only four test consoles, and had probably been used a few times. GD did admit that the program was found on the TE-8009 console.

36. In my years of experience at General Dynamics analyzing and attempting to rewrite hundreds of completely discrepant test programs, it is my absolute belief that this "security busting" outlaw software program was used daily, and responsible for thousands of falsified tests throughout Phalanx productions from approximately 1983 through July of 1987.

37. The fact that the Phalanx Systems were extremely unreliable and certain to fail if relied upon by the Navy to fulfill their intended mission, was well known throughout management levels and the work force at General Dynamics in Pomona. Workers, including myself, often discussed our hopes that the Phalanx would never be relied upon by the Navy during a critical military engagement, and fears that men on board Navy ships would die if their lives ever depended on these systems. After the USS Stark incident, I attempted to get the Navy to do something through my meetings with Gary Smith and Captain Major. The work force was almost bewildered, and overcome with a deep sense of loss and guilt. Management quickly focused on damage control. An example of the company's position regarding the Phalanx role in the Stark incident is attached to this declaration and incorporated herein as Exhibit F.

38. Even after 37 sailors died and others were maimed for life, when an unreliable Phalanx System on board the USS Stark was unable to even recognize a target within its sight, General Dynamics continued to conceal the truth, and keep from taking corrective action.

39. I am personally familiar with the functions and capabilities of the Phalanx that was on board the USS Stark. I am aware of certain parameters, and radar frequency information that is classified. I was required to, and did, hold a security clearance for access to this information. None of the information that was classified is relevant to the performance of the Phalanx System on the night of the accident.

40. The information that is classified would deal with the Phalanx's ability to continue tracking its target in a

hostile electromagnetic environment. This was not the scenario on the night of the attack.

41. I reviewed internal information from inquiries conducted by the company into the Stark incident. I further reviewed investigations conducted by the United States Navy that were publicly reported. The information consistently indicated that the Phalanx was in AAW manual at the time the Stark was attacked.

42. It was further reported that the Phalanx did not hand over from search to track radar. It never detected an inbound missile that is the very threat the Phalanx was designed to identify and destroy.

43. Failure of the Phalanx System to locate, hand over and track the inbound Exocet missiles on the night of the Iraqi attack in May of 1987 is a failure that is consistent with circuit card anomalies or defects that should have been detected at the Pomona Plant, but the tests were never done and the results were falsified. The fact that the system on board the Stark, prior to the incident, had been experiencing breakdowns and circuit card failures, is also consistent with well-known reliability problems of the Phalanx System, which result from falsified Government required testing at General Dynamics in Pomona.

44. The fact that on the night of the incident both Exocet Missiles impacted the USS Stark and that sailors died, was absolutely expected by management of General Dynamics Pomona Phalanx Program, should the Phalanx ever be relied upon to fulfill its intended mission.

I make this declaration of my own knowledge, and if called upon to testify to the same in a Court of Law, I am able and willing to do so.

I declare under penalty of perjury, pursuant to the Laws of the State of California, that the foregoing is true and correct.

Executed this 19 day of January 1991, at Riverside, California.

s/David Villanueva

DAVID VILLANUEVA

[EXHIBITS OMITTED]

DECLARATION OF JASON MADDEN

I, JASON MADDEN, declare and state as follows:

1. That I am over 18 years of age, and a citizen of the United States. I reside in Rancho Cucamonga, California. I am fully competent to testify, and have knowledge of all the facts stated herein.

2. I am a former employee of General Dynamics, Pomona Division, in Pomona, California, where I worked from March of 1979 until August of 1988.

3. Prior to working for General Dynamics, I developed experience and expertise as a technician and electrician, working on mechanical, electrical, and electronics equipment. I was hired into General Dynamics as an Industrial Electrician "A", and worked in that capacity from March of 1979 through March of 1985. During this period of time, I became familiar with the installation, maintenance, and repair of computer-controlled industrial equipment, computer labor equipment, and other high technology production equipment.

4. From March of 1985 until August of 1988, I was a calibration technician responsible for maintenance and repair of Department 71 Phalanx test equipment. I was responsible for preparing Government required Quality Assurance documentation related to equipment and test procedures, test fixtures, and test codes.

5. By approximately December of 1985, I had become familiar enough with Phalanx test equipment and Phalanx circuit cards undergoing tests, to comprehensively understand the relevant Navy requirements and specifications

that were incorporated into General Dynamics tests and procedures. This is when I became aware that the practices which I had previously thought were just "strange" were actually illegal methods that GD personnel were using to get Phalanx hardware to pass tests.

6. I was primarily responsible for the test equipment that conducted lower level testing (LLT) of circuit cards that made up the electronics of the Phalanx system. Among the particular test stations that I maintained, was the TE-8009, which tested approximately 120 of the approximate 300 Phalanx circuit card types, TE-8010 (noise), 8005 (radio frequency), 8008 (intermediate frequency), 8025 (radar), and TE-8019 (high voltage) and 8029 (high voltage sub-assembly).

7. After lower level testing and assembly, completed Phalanx systems were tested at TE-8000, which was the "Final Acceptance Test" for completed Phalanx Systems, and also required by the Navy.

8. I believe in approximately December of 1985, I witnessed Group Engineer Delano Alli standing at the TE-8009 one morning when I came in. Numbers were flashing across the CRT screen for this computerized test station, exhibiting some sort of program that I was not familiar with. I had seen this at times before, but I did not understand what the program was used for, or what it did, and I was surprised to see Mr. Alli accessing this program at this test station. A co-employee named Tom Foster was present, and he told me that Alli was working on the station. When Mr. Alli saw me, he quickly gathered some papers together, exited the program, and left.

9. About six months later, I finally asked GD Tech. Richard Lervolt what the program was for, when I saw him running it on a different station. This was when I first learned that engineers used this program to break security codes that existed on this test equipment. These security codes were required by the Navy, so that the test software loaded onto the test systems in order to test Phalanx hardware, could not be altered or changed in any way. I was aware that the test software had to be accepted and approved by the Navy. The Navy further required that the test stations be secured for assurance that Phalanx circuit cards were in fact being tested to required parameters.

10. This software program, after breaking the security codes, allowed engineers to alter parameters in order to get failing hardware to pass.

11. Throughout 1986, as I performed my responsibilities in maintaining and calibrating the test equipment, I became aware of just how frequently this program was used. It existed on literally every piece of test equipment that I serviced. I also discovered and regularly witnessed on a daily basis, certified test operators conducting a wide range of different methods to "cheat" testing any way they could during their shift.

12. These methods of "test cheating" that I observed primarily involved running tests over and over again on one circuit card under test, until they were able to achieve a "pass" result. If any history files were kept on the computer, they were erased. In some cases, stations did not maintain history files, so there was no record of the numerous failures that had occurred prior to a "pass" result.

13. Test operators were also aware of a trick that involved determining at which test parameter a particular card would fail. The operator would wait until the test the parameter just before the failing point, and then would "abort" the test. On some stations, the computerized equipment would produce a "pass" result, even though the test had been stopped short prior to a point of known failure.

14. As I became more experienced, it was obvious that test operators could not get Phalanx circuit cards to pass required testing, without cheating the cards through one way or the other. In my conversations with these "CTOs" (Certified Test Operators), I learned that their jobs, raises, bonuses, and employee reviews were based on their production yield -- how many circuit cards they passed through tests.

15. I learned that the "strange" program that I had seen used by Delano Alli and others, was primarily accessed by failure diagnosis engineers, when none of the test cheating methods used by CTOs would work.

16. When the engineers were presented with circuit cards that could not be made to pass, instead of analyzing what was wrong with the hardware, they used this "security-busting" program, to widen the parameters of the software.

17. Test falsification went on to such a degree, that it actually constituted the normal every-day life in the Phalanx circuit card test area.

18. It was well known that the test software was bad, and in some cases we knew that the hardware was bad, but in general, we did not know whether circuit cards under

tests that were failing were bad, good, or otherwise. We were simply not conducting any type of reasonable, required, or reliable testing at all. We were under great pressure from management to keep the production rate up. We were also expected to keep our mouths shut and put on a good show for the Naval plant representatives at the Pomona facility. Still, General Dynamics certified that we had performed all required tests, and that each Phalanx we delivered met Navy specifications.

19. I began to discuss test falsification at the time that I became aware of it. I first spoke with Larry Vaughn, a Supervisor of Quality Assurance Engineering in Department 27-A. He was fully aware of the regular occurrence of falsification on all different test stations, and the various methods that CTOs used. He was also aware of the security-busting program that engineers used when the CTOs failed.

20. I personally spoke with Vaughn's boss, John Stewart, the Chief of Quality Assurance Engineers. Through these conversations with Stewart, I learned that he was personally aware of these details.

21. During the beginning of 1986, I also spoke with Don Humphries, the Quality Assurance Manager, as well as another Chief Quality Assurance Engineer named Chuck Head. They were fully aware of these same facts, and GD's longstanding efforts to conceal this from the Navy.

22. I also had conversations with Danny Madison, the Superintendent of Phalanx production, who was well aware of the circuit card test falsification and details that I've described. As time went on, I learned that Madison, who

had a great deal of communication with upper level management, was a prime instigator of the test cheating.

23. Some time after the Stark incident, in approximately August of 1987, I set up a meeting with Rick Riley, the Chief of Engineering for Phalanx production. I also requested that my supervisor, Larry Vaughn, attend because I believed he would support and confirm the facts regarding massive test cheating of Phalanx circuit cards. I began reporting the history of the widespread cheating that I had observed, when Riley had an extremely sudden and hostile reaction. He told me that he did not want "to hear that kind of (explicative) (sic), and never to bring that kind of (explicative) (sic) to my office again." He ordered me to leave his office, and I left.

24. During later 1986 and early 1987, before the Stark incident, I used to have lunch in the Failure Diagnosis Room, and frequently spoke with the engineers about the Phalanx System. I used to sit in these groups, comprised of failure diagnosis team engineers, both during lunch and at coffee breaks. I had discussions about the system with other maintenance technicians from my own group as well. We talked about how the Phalanx could not possibly be a reliable system, and that we wouldn't ever want to have our lives to depend on it. Among the individuals that expressed these types of concerns and made these types of statements were Robert Tobin, Nasim Aziz, and Joe Puckett.

25. Delano Alli sometimes joined in these conversations, and we had arguments at times, because Alli skoffed (sic) at our concerns over the reliability of the Phalanx. During one argument, I directly accused him of not being concerned with the quality of the system. He stated "GD don't give a (explicative) (sic) about the Phalanx

working, and don't give a (explicative) (sic) about the Navy, all they give a (explicative) (sic) about is putting a dollar in their pocket and a dollar in the stockholder's pocket, and that's all they care about, so don't talk to me about quality."

26. The more I learned about the falsification of circuit card tests, the more I could not understand how General Dynamics was representing that the completed Phalanx systems were passing 30-hour Final Acceptance Tests at TE-8000. Just after the Stark incident, I spoke to my counterpart, Paul Maxfield, who was the Quality Assurance Calibration Technician for TE-8000. He told me about a program called "PUDD", which was used at Final Systems Test. "PUDD" stands for "Purge Dot D", and was used to purge the data file history of failures during the 30-hour operational tests. He told me that when the Phalanx fails, the operators and engineers go in and erase the failure, using "PUDD", and then tweak or change something in the Phalanx system to prevent the failure from appearing again.

27. I spoke with Larry Vaughn about "PUDD", and he admitted to knowing about this as well. He said that if anybody ever found out about that program, "It would shut this company down."

28. I also spoke to Terry Pickerel, a Quality Assurance Specialist Engineer in my Department, who was in charge of the people that fix the test station computers. He told me that the use of PUDD was leaving some tell-tale signs on the test print-out, and indicated that they hadn't "perfected PUDD" yet, because of that. From my conversations with these individuals during the summer of 1987, I became aware that "PUDD" had been used for quite some time, possibly throughout the history of Phalanx production. From these conversations, it was clear to me

that the program was used on a regular basis, during final acceptance testing of Phalanx Systems produced for the Navy by General Dynamics.

29. Both the lower level test cheating that I was intimately familiar with, and the use of "PUDD" at final acceptance test, were regular test falsification methods used by General Dynamics during the time that the Phalanx System destined for the USS Stark was manufac'ured and tested. There is no question in my mind that the circuit cards that make up that system, and the system itself at final acceptance test, were subjected to the types of falsified testing that I have described in order to deliver it to the Navy.

30. Because my conversations with General Dynamics supervisors and managers did not result in any corrective action being taken at the plant, I began regularly informing the Naval Plant Representatives about these blatant falsifications during 1986, 1987, and 1988.

31. The information I turned over to the NAVPRO resulted in three "Method C" level disciplinary actions taken by the Navy against the Pomona plant from 1986 to 1988. I have attached documentation regarding one particular "Method C" issued by the Navy on July 22, 1987, to the GD Pomona Plant shortly after the Phalanx incident. This document is attached hereto and incorporated herein by reference as Exhibit A.

32. I demonstrated to the Navy that CTOs were continuing to run multiple tests on a single card, until a pass result was obtained, without documenting or reporting failures as required by the Navy. I had further shown the Navy additional evidence that test results handwritten on

forms showed "passes", but the computer history files showed failing results. These and other methods of test falsification were confirmed by the Navy, and are referenced in this "Method C". This document clearly demonstrates that just after the Stark incident, General Dynamics continued to falsify Phalanx testing, and continued concealing these acts from the Navy.

33. As it was clear to me that the company had no intention to take corrective action with regard to Phalanx testing at every level, I decided to obtain a copy of the outlaw "security-busting" software program that had been in use at lower level test for years, and turn it over to the Navy. Upon obtaining the program, I turned it over to Evelyn Barry of the NAVPRO. I have attached a Department of the Navy Memorandum dated July 27, 1988, to this declaration, and it is incorporated herein by reference as Exhibit B. In this document, the Navy confirmed that "the tape contains a short program which lists all of the Master Security Codes in the test computer files. Anyone using this program would gain access to the test files security codes. Once these codes are compromised, the test file may be altered by the user at will. Use of this program or similar programs could provide users the ability to bypass the present configuration control procedures used to prevent tampering of the test programs."

34. The Navy then took further disciplinary action against the Pomona plant. However, the Navy did not investigate the extent to which this program was being used, although its only purpose to exist was clearly illegal.

35. Instead, for reasons unknown, the Navy relied on General Dynamics to investigate and report admissions of its own violations by developing and using this program.

36. I was terminated approximately one month after I turned this outlaw software program over to the Navy.

I make this declaration of my own knowledge, and if called upon to testify to the same in a Court of Law, I am able and willing to do so. I declare under penalty of perjury, pursuant to the Laws of the State of California, that the foregoing is true and correct. Executed this 19th day of Jan, 1991, at 12486 Morning Glory R. Cucamonga, California.

s/Jason Madden

JASON MADDEN

[EXHIBITS OMITTED]